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Supreme Court of the United States

OCTOBER TERM, 1939

**STATE OF MICHIGAN, AND MICHIGAN PUBLIC SERVICE
COMMISSIONERS, PETITIONERS**

FEDERAL ENERGY REGULATORY COMMISSION

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**BRIEF FOR THE
FEDERAL ENERGY REGULATORY COMMISSION
IN OPPOSITION**

JOHN G. ROBERTS, JR.
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 625-2217

WILLIAM E. SCHERMAN
General Counsel

JOHN M. FERT
Deputy

THE HON. C. COOK
Attorney
Federal Energy Regulatory Commission
Washington, D.C. 20426

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QUESTION PRESENTED

Whether transportation of interstate natural gas by an interstate pipeline company directly to a single industrial owner/consumer in Michigan is "transportation * * * in interstate commerce" within the meaning of Section 1(b) of the Natural Gas Act, 15 U.S.C. 717(b), and thus subject to the jurisdiction of the Federal Energy Regulatory Commission.

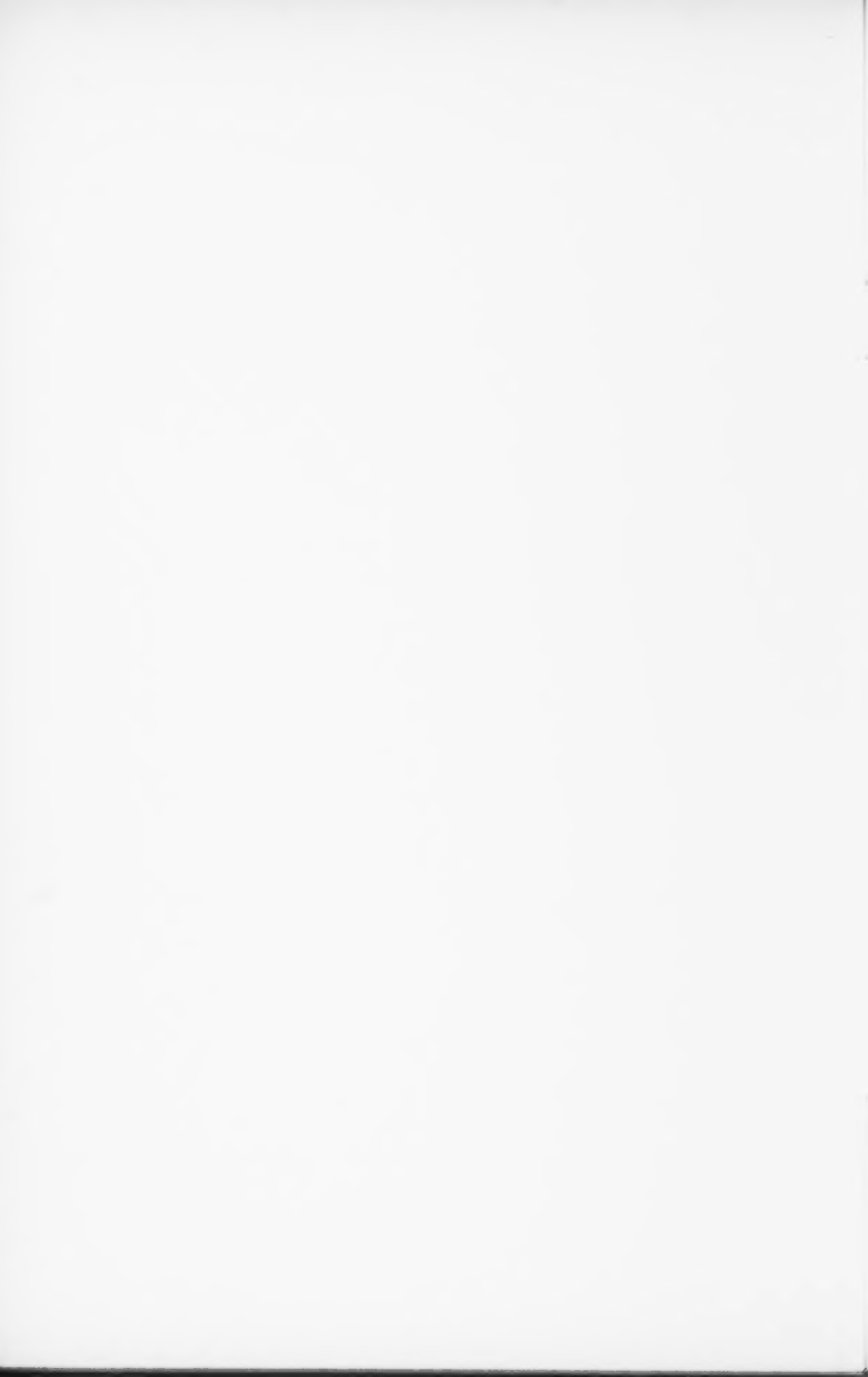


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In the Supreme Court of the United States

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No. 89-1161

STATE OF MICHIGAN, AND MICHIGAN PUBLIC SERVICE
COMMISSION, PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION

*ON PETITION FOR A WRIT OF CERTIORARI
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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 883 F.2d 117. The opinions and orders of the Federal Energy Regulatory Commission (Pet. App. 20a-221a) are reported at 38 F.E.R.C. ¶ 63,009, 40 F.E.R.C. ¶ 61,219, 42 F.E.R.C. ¶ 61,076, 42 F.E.R.C. ¶ 61,381, 44 F.E.R.C. ¶ 61,410, and 44 F.E.R.C. ¶ 61,424.

JURISDICTION

The judgment of the court of appeals was entered on August 18, 1989. A petition for rehearing was denied on October 26, 1989 (Pet. App. 18a). The petition for a writ of certiorari was filed on January 24, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 1(b) of the Natural Gas Act (NGA), 15 U.S.C. 717(b), provides that the NGA "shall apply to the transportation of natural gas in interstate commerce * * * but shall not apply to any other transportation * * * of natural gas or to the local distribution of natural gas." Under Section 7(c) of the NGA, 15 U.S.C. 717f(c), a natural gas company may not "engage in the transportation * * * of natural gas, subject to the jurisdiction of the Commission" nor "undertake the construction or extension of any facilities therefor * * * unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations."

2. a. In this case, Panhandle Eastern Pipe Line Corporation (Panhandle), an interstate pipeline, applied to the Federal Energy Regulatory Commission for a certificate of public convenience and necessity authorizing it to transport gas purchased in Oklahoma by National Steel Corporation (National Steel) to National Steel's Michigan plant for consumption there. National Steel had previously purchased gas from Michigan Consolidated Gas Company (Mich-Con), a local distribution company in Michigan. Mich-Con had also transported gas that National Steel purchased for its own use from third parties. Faced

with loss of National Steel as a customer, MichCon, along with petitioners State of Michigan and Michigan Public Service Commission, opposed certification of the proposed transportation of gas and construction of the connection between Panhandle's interstate pipeline and National's plant.¹ They contended, *inter alia*, that FERC lacked jurisdiction to certify the transaction at issue because it constituted "the local distribution of natural gas"—as opposed to "the transportation of natural gas in interstate commerce." 15 U.S.C. 717(b). See Pet. App. 4a-7a, 8a.

b. After a lengthy hearing, an administrative law judge concluded that the NGA conferred jurisdiction on the Commission to certify Panhandle's proposed service and that the arrangement would serve the

¹ An interstate pipeline owned by Panhandle traverses National Steel's property in Michigan. Under the agreements giving rise to this case, Panhandle and National Steel arranged that Panhandle would add fittings and pipes to tap its line at the National Steel location. Pet. App. 4a-5a. Absent this connection, Panhandle would have had to deliver the gas to MichCon, which would in turn deliver it to National Steel. In a related case, *Michigan Consolidated Gas Co. v. Panhandle Eastern Pipe Line Co.*, 887 F.2d 1295, 1297 (1989), petition for cert. pending, No. 89-1160 (filed Jan. 24, 1990), the Sixth Circuit noted that under preexisting arrangements Panhandle had transported gas purchased by National Steel in Oklahoma to Michigan for 41 cents per 1,000 cubic feet; MichCon in turn charged National Steel 80 cents per 1,000 cubic feet to transport the gas five miles to National Steel's plant.

The parties and the court of appeals referred to the new arrangement as a "bypass." That term refers to the transportation of interstate natural gas (including construction of necessary facilities) directly to an end-user by an interstate pipeline in a situation in which an existing local distribution company asserts that it is able and willing to perform the transportation service.

public convenience and necessity. Pet. App. 105a-139a. The ALJ found that the proposed service would produce cost savings to National Steel on the order of \$10,000,000 to \$12,000,000 per year minus additional expenditures necessary to arrange for backup service from MichCon, that these savings would materially improve National Steel's competitive position and would thereby benefit its employees and the community, and that these advantages would more than offset the increased costs that remaining customers or shareholders might be required to bear. *Id.* at 126a-130a; see also *id.* at 106a-121a.

c. The Commission affirmed the ALJ's decision with respect to the proposed service and granted Panhandle a certificate authorizing both the transportation service and the construction and operation of facilities to provide the service. Pet. App. 65a-86a. The Commission rejected petitioner's contention that it lacked jurisdiction under Section 1(b) of the NGA. The Commission explained that the case "involves natural gas that is purchased by National Steel in Oklahoma and transported by Panhandle to Michigan"; thus, it continued, the gas "will be moving in interstate commerce as defined by the NGA." Pet. App. 49a. Noting that its jurisdiction "extends over the transportation of gas to be delivered to end-users" (*ibid.*), the Commission rejected petitioner's contention that the transaction should be deemed the local distribution of gas for purposes of the NGA's jurisdictional provision (*id.* at 50a-55a).²

² With respect to the merits of the application, the Commission noted that although it had "indicated a preference for service to industrial customers by LDC's [local distribution companies, such as MichCon]," it had also "made clear that

3. The court of appeals upheld the Commission orders, ruling that "the Commission's decision is supported by substantial evidence and is neither arbitrary nor capricious." Pet. App. 15a. The court acknowledged that "local distribution of natural gas" is not subject to Commission jurisdiction under the Natural Gas Act, but found that the arrangement between Panhandle and National Steel "involves merely interstate transportation of natural gas, a subject matter clearly within the Commission's jurisdiction." *Id.* at 9a. The court explained:

The present arrangement is the subject of federal regulation pursuant to the NGA because the arrangement involves the transportation of natural gas in interstate commerce, not a local sale. It is undisputed that title to the gas passes in Oklahoma, not Michigan. Panhandle, the transporter of the gas, is not a party to the sale. Panhandle's role under the arrangement is simply to transport National's gas from one state to another across several intervening states. It is hardly conceivable that a transaction could fit more neatly into the category of "transportation of natural gas in interstate commerce."

*Ibid.*³

it would not rigidly follow that rule, but rather examine the individual circumstances of each before applying the policy." Pet. App. 68a. From that perspective, it upheld the ALJ's assessment of the balance of considerations relevant to the bypass at issue. See Pet. App. 67a-69a.

Commissioner Stalon dissented with respect to the merits of the Commission's decision. He did not, however, criticize the majority's analysis of the jurisdictional issue presented by the petition. Pet. App. 87a-92a; *id.* at 64a.

³ In a separate action, MichCon and petitioners have sought to establish that state authorities have concurrent jurisdic-

ARGUMENT

The decision of the court of appeals is correct, and is supported by a number of this Court's decisions recognizing the scope of the Commission's jurisdiction over the interstate transportation of natural gas. The decision below does not conflict with decisions relied upon by petitioners—decisions which in the main involve limits on the Commission's authority to regulate interstate sales of natural gas, a separate and independent head of Commission jurisdiction. Further review is not warranted.

1. This Court has long recognized the authority of FERC and its predecessor, the Federal Power Commission, to regulate the interstate transportation of gas directly to end-users. In *United Gas Pipe Line v. FPC*, 385 U.S. 83, 89 (1966), this Court observed that the NGA vests the Commission with jurisdiction over interstate transportation of natural gas "whether the transportation is for hire or for sale and whether the sale is for consumption or resale"

tion to regulate the transaction at issue here. In *Michigan Consolidated Gas Co.*, 887 F.2d at 1300, 1302, the Sixth Circuit—agreeing with the court of appeals that the transaction was within FERC's jurisdiction over interstate transportation—concluded that "the Panhandle-National Steel bypass involves only the interstate transportation of natural gas, and * * * the Act preempts MPSC [Michigan Public Service Commission] regulation over the bypass." The petitioners in this case have also sought further review of the Sixth Circuit's judgment by means of a petition (No. 89-1160) filed on the same day as this one. Though not a party to that action, FERC participated as an amicus curiae in the Sixth Circuit; it argued that the NGA preempted state regulation.

The court in this case noted that the issue of preemption was "not the subject of the present petition for review." Pet. App. 10a.

(emphasis added). See also *FPC v. Transcontinental Gas Pipe Line Corp. (Transco)*, 365 U.S. 1 (1961); *FPC v. East Ohio Gas Co.*, 338 U.S. 464 (1950); *Panhandle Eastern Pipe Line Co. v. FPC*, 359 F.2d 675 (8th Cir. 1966).

In *Transco*, this Court upheld a decision by the Commission denying a certificate of public convenience and necessity for the interstate transportation of gas purchased by a New York utility in Texas. While the Court noted that the "direct" sale did not fall within the Commission's jurisdiction over interstate sales, the transaction was subject to the Commission's jurisdiction insofar as the Act "requires the Commission to certificate the transportation of gas pursuant to the sale." 365 U.S. at 4.¹ The Court further held that in exercising that jurisdiction, the Commission could take account of the end use of the gas, the "preemption of pipeline facilities," and the effect of the transaction on prices. *Id.* at 31. The transaction at issue in this case, like that in *Transco*, involves transportation for hire. Here, as in *Transco*, the pipeline sought authorization to transport gas to be purchased by an end-user in one state and to be consumed by that end-user in another state. Thus, *Transco* necessarily indicates that the Commission has jurisdiction in this case; indeed, *Transco* underscores the Commission's responsibility to consider a broad range of issues relevant to the public interest.

¹ Under Section 1(b) of the NGA, the Act applies to "the sale in interstate commerce of natural gas *for resale for ultimate public consumption for domestic, commercial, industrial, or any other use*" but not to "any other * * * sale of natural gas * * *" (emphasis added). As is discussed further below, the limitation on the Commission's jurisdiction to regulate *sales* of natural gas does not qualify its separate jurisdiction to certificate the interstate *transportation* of gas.

not just those relating to transportation as such, when it is asked to certify interstate transportation.

In *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972), this Court again emphasized the breadth of the Commission's jurisdiction over the interstate transportation of gas. In that case, a pipeline that experienced shortages of natural gas sought approval of a plan to curtail deliveries to all of its customers, including direct-sale customers. One direct-sale customer argued that the Commission had no jurisdiction to oversee such sales. This Court rejected that contention, holding that the Commission could rely upon its jurisdiction over interstate transportation. After referring to the three heads of Commission jurisdiction (interstate transportation, sales in interstate transportation for resale, and natural gas companies engaged in such transportation or sales), the Court emphasized:

Each of these is an independent grant of jurisdiction and, though the Act's application to "sales" is limited to sales of interstate gas for resale, the Act applies to interstate "transportation" regardless of whether the gas transported is ultimately sold retail or wholesale.

Id. at 636.

As the court of appeals noted in this case, "[t]he arrangement in dispute involves merely interstate transportation of natural gas, a subject matter clearly within the Commission's jurisdiction." Pet. App. 9a.

2. Contrary to petitioners' contention (Pet. 9-13), there is no inconsistency between that conclusion and this Court's decisions in *Panhandle Eastern Pipe Line Co. v. Michigan Public Serv. Comm'n* (*Pan-*

handle/Michigan), 341 U.S. 329 (1951), and *Panhandle Eastern Pipe Line Co. v. Public Serv. Comm'n of Indiana* (*Panhandle/Indiana*), 332 U.S. 507 (1947). In both those cases, the Court held that a State's regulation of sales by interstate pipelines to direct-users in that State is not preempted by either the Natural Gas Act or the Commerce Clause. The Court did not purport to address the question presented by this case, which is whether the Commission has jurisdiction over the interstate *transportation* of natural gas to a direct-user from a field where it has been purchased by that user. Indeed, in *Transco*, this Court found that there was no conflict between the Act's reservation of state authority over rates charged in retail gas sales—the authority recognized in *Panhandle/Michigan* and *Panhandle/Indiana*—and federal authority over transportation of the interstate gas. See 365 U.S. at 27-28.

Petitioners complain that recognition of the Commission's jurisdiction over the interstate transportation of gas to National Steel places "form over substance" and "allow[s] for the usurpation of state authority." Pet. 12. More particularly, they contend that the exercise of Commission jurisdiction "effectively authorizes the FERC to engage in the review of the propriety of intrastate rates and rate designs which are the exclusive province of the State commissions." Pet. 13. Substantially similar arguments were rejected by this Court in the *Louisiana Power* and *Transco* cases where the Court held that Congress, by enacting the NGA, intended "to impose a comprehensive regulatory system on the transportation, production, and sale" of natural gas. *Transco*, 365 U.S. at 28; *Louisiana Power*, 406 U.S. at 641. Where, as here, comprehensive control over interstate transpor-

tation is beyond the competence of state authorities, "the conclusion is irresistible that Congress desired regulation by federal authority rather than nonregulation." *Transco*, 365 U.S. at 28; *Louisiana Power*, 406 U.S. at 641.

3. Petitioners cannot contend that there is any conflict among the circuits with respect to the jurisdiction of the Commission over transportation for hire by an interstate pipeline of interstate gas to an industrial end-user. To the contrary, the D.C. Circuit and the Sixth Circuit have agreed that transportation by Panhandle of National Steel's gas from Oklahoma to National Steel's plant in Michigan is interstate transportation and is not "local distribution" within the meaning of Section 1(b) of the NGA. Pet. App. 8a-10a; *Michigan Consolidated Gas Co. v. Panhandle Eastern Pipe Line Co.*, 887 F.2d 1295, 1300 (6th Cir. 1989), petition for cert. pending, No. 89-1160 (filed Jan. 24, 1990).⁵

Petitioners argue in both cases that, even if the transportation of natural gas by Panhandle from Oklahoma to Michigan is not "local distribution," the construction of facilities to deliver that gas to National Steel in Michigan is subject to state regulation,

⁵ The Tenth Circuit has also had before it the issue of FERC's exclusive jurisdiction over transportation for hire of interstate gas directly to an end-user. See *Williams Natural Gas Co. v. City of Oklahoma City*, 890 F.2d 255 (1989). FERC participated as amicus curiae in that case and urged that its jurisdiction was exclusive. The Tenth Circuit held that FERC's order must be challenged in the petition for review pending before the court of appeals for the District of Columbia Circuit. A petition for a writ of certiorari to the Tenth Circuit was filed February 12, 1990 (No. 89-1296).

because it is necessary to accomplish the "local distribution" of the gas, not its interstate transportation. See Pet. 11; 89-1160 Pet. 8. Petitioners' truncated view of "interstate transportation" ignores this Court's directive that the line drawn by Congress between federal and state jurisdiction in this area is "clear and complete." *Panhandle/Indiana*, 332 U.S. at 517; see 15 U.S.C. 717f(c) (requiring FERC certificate of public convenience and necessity for construction or extension of facilities for interstate transportation, as well as for interstate transportation itself, of natural gas). The result reached by the court of appeals here, as by the Sixth Circuit, properly preserves a clear division between state and federal authority.

4. "Bypass" transportation cases such as this one raise fact-specific issues that require the balancing of competing concerns such as the federal interest in furthering competition in natural gas markets and state interests in subsidizing residential natural gas consumers by means of charges to industrial end-users. The court of appeals in this case determined that FERC's decision to certificate the proposed service was supported by substantial evidence and was not arbitrary or capricious. Pet. App. 15a. Petitioners have not challenged that holding. The reasonableness of the authorization of the transportation bypass is therefore not before this Court.

CONCLU

The petition for a writ
denied.

Respectfully submitted.

JO

WILLIAM S. SCHERMAN
General Counsel

JEROME M. FEIT
Solicitor

CATHERINE C. COOK
Attorney
Federal Energy Regulatory Co

MARCH 1990

* The Solicitor General is disq

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N G. ROBERTS, JR.
*Acting Solicitor General **

mission

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